IN THE

SUPREME COURT OF MISSOURI

No. SC93061

LOREN COOK CO.,
Appellant,

v.

DIRECTOR OF REVENUE,
Respondent.

On Petition for Review from the
Missouri Administrative Hearing Commission

REPLY BRIEF OF APPELLANT

MARK A. OLTHOFF (MO #38572)
SCOTT LINDSTROM (MO #57153)
JON R. DEDON (MO #62221)
POLSINELLI PC
1600 Twelve Wyandotte Plaza
120 W 12th Street, Suite 1600
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)
molthoff@polsinelli.com
slindstrom@polsinelli.com
jdedon@polsinelli.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

I. Respondent's Brief Makes Clear that Only One Issue Remains in Dispute

Respondent Director of Revenue's Brief helpfully narrowed the scope of this case. The Director of Revenue explicitly concedes Loren Cook's first Point Relied On, and agrees that the "trade-in" statute, RSMo § 144.025, applies to the use tax, RSMo § 144.610. This is consistent with the language of the statutes, the United States Constitution, and this Court's previous jurisprudence, and as such warrants no further discussion.

The Director also implicitly concedes, or at least does not contest, Loren Cook's third Point Relied On that, if the Court holds that Loren Cook's transaction does not qualify for the "taken in trade" reduction, then the holding should be applied on a prospective-only basis. Under RSMo § 143.903, "an unexpected decision by or order of a court of competent jurisdiction or the administrative hearing commission shall only apply after the most recently ended tax period of the particular class of persons subject to such tax imposed by chapters 143 and 144, RSMo, and any credit, refund or additional assessment shall be only for periods after the most recently ended tax period of such persons." In this case, Loren Cook's trade-in transaction complies with both the letter and the spirit of RSMo §144.025.1. Moreover, the Administrative Hearing Commission's decision in *Great Southern*, not to mention this Court's holding, occurred *after* the trade-in transaction had taken place. Therefore, there is no way Loren Cook could have

anticipated that this Court might hold that the taken in trade reduction was unavailable. In light of the Director's failure to contest this point in its Brief, Loren Cook respectfully requests that, if this Court holds that the taken in trade reduction is unavailable for the present trade-in transaction, such a holding be applied only prospectively.

II. Loren Cook is Entitled to the Taken In Trade Reduction

The sole remaining issue in dispute is whether Loren Cook is entitled to RSMo §144.025.1's taken in trade use tax reduction. Loren Cook's trade-in transaction with TVPX Sales, LLC ("TVPX") clearly complied with the requirements of the statute. Moreover, the trade-in transaction adhered to the language of the only Missouri case interpreting the statute, *Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22 (Mo. banc 2008). Finally, the record makes clear that this trade-in transaction was no "legal fiction": Loren Cook entered into a trade-in agreement with a licensed aircraft dealer, which the aircraft dealer profited from.

A. Loren Cook's Trade-In Transaction Complied with the Requirements of RSMo §144.025

Loren Cook's trade-in transaction complies with the requirements of RSMo §144.025.1. That section provides, in pertinent part, that:

> where any article on which sales or use tax has been paid, credited, or otherwise satisfied or which was exempted or excluded from sales or use tax is taken in trade as a credit or part payment on the purchase price of the article being sold, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price which exceeds the

> actual allowance made for the article traded in or exchanged, if there is a bill of sale or other record showing the actual allowance made for the article traded in or exchanged.

Here, there is no dispute that the Relinquished Cessna 525A was an article on which the use tax has been paid, under the first clause above. In addition, there is "a bill of sale or other record showing the actual allowance made for the article traded in or exchanged": TVPX issued an Invoice to Loren Cook for the Purchased Cessna 525B aircraft, showing that the purchase price of the Purchased Cessna 525B was $7,240,125.00, the trade-in value of the Relinquished Cessna 525A was $4,725,000.00, and the Cash Trade Difference was $2,515,125 (Loren Cook's Exhibit 2, document 13, LCC 000240). Under the General Assembly's view, the only proof that a taxpayer must provide to show that one article was "taken in trade" for another is a "bill of sale or other record showing the actual allowance made for the article traded in or exchanged," which Loren Cook has provided.

B. Loren Cook's Trade-In Transaction Complied with this Court's holding in *Great Southern*

Only one Missouri case has addressed the meaning of §144.025.1's taken in trade reduction: *Great Southern Bank v. Director of Revenue*, 269 S.W.3d 22 (Mo. banc 2008). In the core of that opinion, the Court stated:

> The term "taken in trade" is not defined in the statute. When a statutory term is not defined, courts apply the ordinary meaning of the term as found

> in the dictionary. *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 873 (Mo. banc 2006). The word "trade" means "to give in exchange for another commodity." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) at 2421. The word "exchange" means "[t]he act of giving or taking one thing in return for another," or "the process of reciprocal transfer of ownership (as between persons)." WEBSTER'S at 792. *See also* BLACK'S LAW DICTIONARY (7th Ed.1999) (defining "exchange" as "the act of transferring interest, each in consideration for the other"). **A "trade," then, requires that the parties each have title to or ownership of their respective items and then exchange them.**

Id. at 24-25 (emphasis added). In this case, there is no dispute that Loren Cook transferred the title to the Relinquished Cessna 525A to TVPX in exchange for the title to the Purchased Cessna 525B. The AHC concluded as much and the Director has not appealed that Finding of Fact. *See* AHC Decision at ¶ 14, LF 00018.

The record makes clear that TVPX actually took title to the Purchased Cessna 525B from Cessna. Cessna issued its Invoice to TVPX for the Purchased Cessna 525B aircraft (Loren Cook's Exhibit 2, document 7, LCC 000215). Cessna issued the Aircraft Bill of Sale, to TVPX as Purchaser of the Purchased Cessna 525B, which was signed by Cessna Aircraft Company as Seller (Loren Cook's Exhibit 2, document 16, LCC 000248). Cessna issued the Warranty Bill of Sale, dated June 26, 2007, to TVPX as Purchaser of the Purchased Cessna 525B, which was signed by Cessna Aircraft Company as Seller (Loren Cook's Exhibit 2, document 17, LCC 000250). The Delivery Receipt for

the Purchased Cessna 525B indicates that TVPX was the Purchaser and Cessna Aircraft Company was the Seller (Loren Cook's Exhibit 2, document 18, LCC 000252). TVPX registered its ownership with the FAA, indicating that "right, title and interest" had been transferred (Loren Cook's Exhibit 2, document 16, LCC 000248). TVPX completed a Kansas Resale Exemption Certificate evidencing its acquisition of the Purchased Cessna 525B for resale (Loren Cook's Exhibit 2, document 19, LCC 000254). Moreover, testimony at the hearing below made clear that TVPX, a licensed aircraft dealer, took legal title to the aircraft (Tr. at pp. 92–93) and assumed a risk of loss while it held title (Tr. at pp. 107–112). In fact, it was significant to the transaction itself that TVPX take title. (Tr. at pp. 96–97)

Similarly, the record makes clear that, as a result of the trade-in transaction between Loren Cook and TVPX, TVPX took title to the Relinquished Cessna 525A. Loren Cook issued an Aircraft Bill of Sale to TVPX as purchaser of the Relinquished Cessna 525A (Loren Cook's Exhibit 1, document 21, LCC 000407). Loren Cook issued the Warranty Bill of Sale to TVPX as Purchaser of the Relinquished Cessna 525A (Loren Cook's Exhibit 1, document 22, LCC 000410). The FAA issued the Certificate of Aircraft Registration, dated July 5, 2007, for the Relinquished Cessna 525A canceling Loren Cook's recognized ownership and indicating TVPX as the Transferee (Loren Cook's Exhibit 1, document 29, LCC 000427). This document indicates that "right, title and interest" transferred to TVPX. TVPX completed a Kansas Resale Exemption Certificate evidencing its acquisition of the Relinquished Cessna 525A for resale (Loren Cook's Exhibit 1, document 24, LCC 000416). Finally, the Delivery Receipt and

Acceptance for the Relinquished Cessna 525A, indicated C.B. Aviation, LLC as Purchaser and TVPX as Seller (Loren Cook's Exhibit 1, document 27, LCC 000422). *Great Southern* required that, in order for §144.025.1's taken in trade reduction to apply, the parties must have and then exchange titles to the exchanged articles. Loren Cook has amply demonstrated its compliance with that requirement.

Nonetheless, the Director asks the Court to reject the unambiguous application of §144.025.1 to the trade-in transaction between Loren Cook and TVPX, urging the Court to "look beyond legal fictions and academic jurisprudence in order to discover the economic realities of the case." Resp. Br. at 9 (quoting *Scotchman's Coin Shop v. Administrative Hearing Comm'n*, 654 S.W.2d 873, 875 (Mo. banc 1983), and *Great Southern*, 269 S.W.3d at 25). Apparently regarding the numerous official documents and valid agreements cited in the preceding paragraphs as "legal fiction," the Director argues that "TVPX never actually controlled either airplane." Resp. Br. at 12. The Director does not make clear what it believes would constitute "actual control," or why "actual control" matters in determining §144.025.1's application. The words "actual control" do not appear in either the statute or *Great Southern*. Rather, the prerequisite is whether there was an exchange of ownership or title. 269 S.W.3d at 24-25.

The Director acknowledges this Court's language in *Great Southern* that "[a] 'trade,' then, requires that the parties each have title to or ownership of their respective items and then exchange them," *id.*, but argues that such language is dicta, or at best, is merely *one* requirement for a "trade." Loren Cook respectfully submits that the above-quoted language appears in a core part of the holding in *Great Southern*, and Loren

Cook's compliance therewith, even if not dispositive, weighs strongly in favor of §144.025.1's application.

The Director argues that exchange of title should not be dispositive in light of *Great Southern*'s discussion of *Hutton v. Johnson*, 956 S.W.2d 484 (Tenn. 1997). First, as the Director notes, the record in *Hutton* did not make clear whether the title to the purchased airplane was ever held by the intermediary. Resp. Br. at 13 n.4 (citing *id.* at 487). Thus *Hutton* is in no way inconsistent with a rule that a trade of two titles constitutes a "trade" for §144.025.1's purposes. Second, *Great Southern* appears to cite *Hutton* for the similarity of the statutes and factual situations, rather than for whether exchange of titles should be a primary or dispositive factor. *See* 269 S.W.3d at 25. In any event, there can be little question that, even if *Great Southern*'s language was inconsistent with some element of *Hutton*, the language of *Great Southern* would control this case.

The Director acknowledges that the intermediary in this case, TVPX is a licensed aircraft dealer registered with the FAA, and that Wachovia, the intermediary in *Great Southern* was not. Resp. Br. at 14. This fact further undermines the idea that the trade-in transaction between Loren Cook and TVPX was a "legal fiction." The Director attempts to minimize the significance of this fact by arguing that "presumably," Bell Aviation, the intermediary in the *Hutton* case, was a registered aircraft dealer as well. It goes almost without saying that the records of both *Great Southern* and *Hutton* were silent on that fact, and that nothing can be inferred from such silence. Whatever the facts of *Hutton*,

the fact that the intermediary here is a licensed aircraft dealer serves to favorably distinguish this case from *Great Southern*.

Next, the Director criticizes the documentation of the transaction. It notes that there was little documentation of the movement of money, except that TVPX was paid $3,000 for its services. Resp. Br. at 14. First, as is illustrated above and in Loren Cook's Opening Brief, the record contains substantial documentation of the trade-in transaction, including numerous documents identifying the prices of the aircraft. *See, e.g.,* Loren Cook's Exhibit 2, document 13, LCC 000240 (bill of sale listing the prices paid for the aircraft in the transaction between Loren Cook and TVPX). The legitimacy of the agreements is unquestioned. Section144.025.1 does not apprise transaction parties how their agreements must be structured. It is not clear what more the Director would like to see in this respect or even what the Director believes the agreements should say. Second, Loren Cook respectfully submits that when an aircraft dealer is paid $3,000 in consideration for its services, such a fact is suggestive of a legitimate, actual trade-in transaction, and not some "legal fiction."

The Director also appears critical of the fact that all of the sales documents are dated June 26, and that the registration of the sales contracts of the Purchased Cessna with the International Registry took place in the wrong order.[1] *See* Resp. Br. at 14-15.

[1] The Director argues that the sales contract of the Purchased Cessna (and its engines) from Cessna to TVPX was registered with the International Registry after the sale of the same from TVPX to Loren Cook. This is a straw man argument and the fact lacks

The Director appears to place particular emphasis on the fact that Mr. Thorne accepted delivery of the Purchased Cessna 525B for TVPX, and one minute later accepted delivery of the same aircraft for Loren Cook. *Id.* at 15. However, rather than legal fiction, this is evidence of an efficient, pre-arranged transaction. Would the transaction be improved from the Director's perspective if an additional TVPX representative had been present to sign the documents? Or if Mr. Thorne waited an hour, or a day, to accept delivery on behalf of Loren Cook?[2] Multi-million dollar aircraft transactions are not undertaken by

---

any probative value in this case. First, passages of title and exchanges are not in question. *See* AHC Decision at ¶ 14, LF 00018. Second, the registration with the International Registry was undertaken by a third party, and that party's timing error (or indifference) is not evidence of TVPX's or Loren Cook's intent. Third, the function of International Registry is to give priority to competing interests in mobile assets; it has no bearing on the time at which title in an asset was transferred. *See* Ronald C. C. Cuming, *The International Registry of Interests in Aircraft: An Overview of its Structure*, 11 Unif. L. Rev. 18, 20 (2006) ("The Registry is not a title registry. Only in a restricted negative sense does it address ownership rights in aircraft objects.").

[2] The Director seems to suggest that the Court ought to offer a gloss on §144.025.1 by inserting a temporal requirement, but the General Assembly has not done so. Moreover, the Court in *Great Southern* interpreted a "trade" as being an exchange of

impulse; the agreements are planned out months if not years in advance. The fact that the parties had completely planned out the trade-in agreement here and executed in an efficient procedure does not create a "legal fiction."

Finally the Director notes that TVPX was contractually bound to act as it did in the trade-in transaction, and the indemnification clause in the contract renders the trade-in transaction a legal fiction. First, if TVPX felt it could do better than the trade-in transaction with Loren Cook, either by making more than $3,000 or by making it more quickly, then it could have breached its agreements. The Director notes that TVPX's success "depends on its credibility with future clients" and that such a breach would damage that credibility. *See* Resp. Br. at 15. Taking this speculation as accurate, this merely means that TVPX had an additional financial disincentive to breach its agreement, not that it was impossible to do so.

Although unmentioned in the argument portion of the brief, the Director notes in its fact section that Loren Cook could have engaged in a §144.025.1 trade-in with Cessna, but chose not to. *See* Resp. Br. at 1-2. That is really what this case is about: the Director of Revenue seeks to limit §144.025.1's application to trade-ins with manufacturers, and Loren Cook used a licensed aircraft dealer as an intermediary. Nothing in the statute itself or *Great Southern* prohibit use of an intermediary. Loren Cook entered into a bona fide trade-in agreement with a registered aircraft dealer, the parties legitimately

---

ownership or title, so the Director's apparent criticism of a somewhat contemporaneous exchange of possession is misplaced.

exchanged legal title, and the dealer made money on the transaction. The fact that the transaction was planned out beforehand and executed with efficiency and speed does not convert an otherwise legitimate trade-in transaction into a "legal fiction."

III. Conclusion

For the forgoing reasons, as well as the reasons set forth in its Opening Brief, Appellant Loren Cook Co. respectfully requests that this Court reverse the Administrative Hearing Commission and hold that the taken in trade exemption found at RSMo §144.025.1 applies to the trade-in transaction here, or in the alternative, to reverse the result and apply an adverse ruling on a prospective-only basis.

Respectfully submitted,

POLSINELLI SHUGHART PC

/s/ Jon R. Dedon

MARK A. OLTHOFF (MO #38572)
SCOTT LINDSTROM (MO #57153)
JON R. DEDON (MO #62221)
POLSINELLI PC
1600 Twelve Wyandotte Plaza
120 W 12th Street, Suite 1600
Kansas City, Missouri 64105
(816) 421-3355
(816) 374-0509 (FAX)
molthoff@polsinelli.com
slindstrom@polsinelli.com
jdedon@polsinelli.com

ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE WITH MISSOURI SUPREME COURT RULE 84.06(B)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) in that according to the word count function of Microsoft Word by which it was prepared, contains 2,810 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

/s/ Jon R. Dedon
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing was filed electronically this 19th day of July, 2013, causing a true and correct copy to be transmitted to:

JAMES R. LAYTON
Solicitor General
MO #45631
Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(573) 751-1800
(573) 751-0774 (facsimile)
James.Layton@ago.mo.gov

ATTORNEY FOR RESPONDENT

/s/ Jon R. Dedon
Attorney for Appellant